

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2590

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

No. 74-2590

MARGARET M. LANDON,
Plaintiff-Appellant,

v.

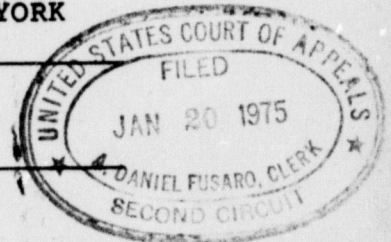
TWENTIETH CENTURY-FOX FILM
CORPORATION

and

COLUMBIA BROADCASTING SYSTEM, INC.,
Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF



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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from a judgment dismissing the complaint, granted on Appellees' motion for summary judgment by Judge Morris E. Lasker in the United States District Court for the Southern District of New York. The opinion is not reported.

STATEMENT OF THE ISSUE

Should the District Court have determined, on a motion for summary judgment, that a contract granting a motion picture company the right to produce and telecast motion picture versions of a literary work also conveyed to the motion picture company the right to make a series of television programs based on the literary work.

STATEMENT OF THE CASE

Nature of the Case

This action was brought by Appellant Margaret M. Landon, authoress of a novel entitled ANNA AND THE KING OF SIAM, for infringement of copyright. The alleged infringing works were a series of television programs called "Anna and the King," produced by Appellee Twentieth Century-Fox Film Corporation ("Fox"), and broadcast by Appellee Columbia Broadcasting System, Inc. ("CBS"). Mrs. Landon also claimed breach of a 1944 contract between herself and Fox, a violation of the antitrust laws by Fox and certain other tortious misconduct by Fox and CBS.

The Proceedings Below

The complaint charges that the television programs produced by Fox and telecast by CBS employed the characters created by Mrs. Landon in ANNA AND THE KING OF SIAM and other material from the novel; that the right to use the characters and other material in television versions of the literary work was not authorized by the contract between Mrs. Landon and Fox; and, therefore, that such use infringed Mrs. Landon's copyright and constituted a breach of the contract (JA 3).^{1/} Appellees denied these allegations (JA 27).

The action below was commenced on November 17, 1972, in the United States District Court for the District of Columbia. Fox and CBS moved, on June 28, 1973, for a change of venue to the United States District Court for the Southern District of New York. That motion was granted on January 14, 1974 (JA 120), over Mrs. Landon's strenuous objection. The principal basis for the change of venue was the convenience of Appellees' witnesses.

On April 12, 1974, Appellees moved for summary judgment on the ground that the 1944 agreement granted Fox all

^{1/} "JA" refers to the Joint Appendix.

rights required to permit Fox and CBS to make and exhibit the series of television programs entitled "Anna and the King." (JA 121) Mrs. Landon cross-moved for partial summary judgment on June 7, 1974, on the ground that the 1944 contract authorized the production and telecast of "motion picture versions" of her book but not of "television versions." (JA 468) As commonly defined in the industry and by Fox's own contracting and corporate practices, the series of television programs at issue were television versions, not motion picture versions.

Judge Lasker granted summary judgment for Appellees on the first count of the complaint on November 13, 1974. (JA 478) (The District Court's Memorandum and Order are hereinafter referred to as "Op.".) He also granted Appellees' motion for summary judgment as to the antitrust and tortious misconduct counts and dismissed the complaint. We adopt and incorporate by reference herein the subject matter of the amicus curiae brief filed by The Authors League of America, Inc. on the antitrust count. We do not pursue the appeal on the dismissal of the tortious misconduct count.

2/
The Facts

Prior to June 1944, Appellant Margaret M. Landon created and wrote an original serious literary work concerned with the struggle for human rights, entitled ANNA AND THE KING OF SIAM. Mrs. Landon owns the basic and renewal copyrights in the literary work which has been published both as a series of magazine installments and as a book. The book has been extremely successful, more than one million copies having been sold in 15 different languages. The trade edition alone is presently in its twenty-first printing in the United States.

On or about December 8, 1944, Mrs. Landon and Fox entered into an agreement in writing. The agreement was drafted by Fox and accepted by Mrs. Landon after incorporation of a few minor changes. At the time of the agreement, both Mrs. Landon and Fox were well aware of the medium known as television.^{3/} The grant language of that

2/ Unless otherwise indicated the statement of facts is taken from the Affidavit of Margaret M. Landon, dated June 4, 1974 (JA 130).

3/ In an agreement dated as early as November 25, 1929, between Fox and Ben Ames Williams for rights in the literary work "A Very Practical Joke," there is an express reference (in Article First (e)) to the medium of "television." (See attachment E(1) to the affidavit of Herbert A. Fierst, dated June 5, 1974 (JA 151). All attachments cited herein are attachments to Mr. Fierst's affidavit.)

agreement followed a standard format utilized by Fox in a substantial number of agreements executed by Fox during the same period. Pursuant to that agreement, Fox was granted, among other things not pertinent here, the right to make and telecast "motion picture versions" of plaintiff's literary work during the periods of the basic copyright and the renewal copyright covering Mrs. Landon's literary work. These agreements, including Mrs. Landon's agreement, do not grant Fox the right to make "television versions" of the author's literary property. On the other hand, in at least thirty-eight agreements executed by Fox with other authors during the four years immediately preceding Fox's contract with Mrs. Landon and in numerous contracts following Fox's agreement with Mrs. Landon, the grant clause expressly conveys to Fox the right to make "television versions," in addition to the right to make "motion picture versions," of the literary work involved. (Attachment F, JA 185)

In accordance with the provisions of its agreement with Mrs. Landon, Fox produced and released a feature motion picture in 1946 entitled "Anna and the King of Siam." This motion picture was exhibited in theaters throughout

the United States and elsewhere and was exhibited on television some years later.

Pursuant to permission granted by Mrs. Landon in an agreement of April 20, 1950, with Richard Rodgers and Oscar Hammerstein, her book was made the subject of a musical play and, subsequently in 1956, a motion picture of the musical play. Both of these were entitled "The King and I" and both enjoyed and still enjoy widespread acceptance by the viewing public. This motion picture was also exhibited on television some years later.

On or about November 12, 1971, Mrs. Landon received from Fox a Notice of Tentative Writing Credits, dated November 9, 1971, indicating that Fox was in the process of producing a series of television programs based upon Mrs. Landon's book.

Immediately thereafter Mrs. Landon notified Fox by telegram and by letter that Fox had no authority to produce or in any way distribute any television program or television series based upon her copyrighted literary work, that she objected to their doing so, and that she reserved all rights and remedies available under law. Since the date of the foregoing notices, Mrs. Landon has

objected continuously to Fox's television series as an infringement of her copyright and a breach of the December 8, 1944 agreement. The attorney for Richard Rodgers and Oscar Hammerstein similarly registered a strenuous objection to Fox's proposed television series, declaring that Fox had never received the right to produce such a series under its 1944 agreement with Mrs. Landon. (Attachment K, JA 447)

On or about June 28, 1972, following an announcement in the trade papers, and in the press generally, that CBS intended to telecast a weekly television series entitled "Anna and the King," Mrs. Landon notified CBS by letter of her position that she had retained such television rights in her literary work, that she had not authorized Fox to make a television series based upon her book, that she objected to its doing so, and that she objected to CBS and any of its affiliates or subsidiaries telecasting such a series. The same notification was sent to every one of the CBS affiliated stations.

With full knowledge of Mrs. Landon's rights in ANNA AND THE KING OF SIAM, and of her copyright therein, without any consent or license from her, and without any consideration to her, Twentieth Century-Fox Television,

a division of Fox, produced and made available to CBS a pilot and twelve additional episodes of Mrs. Landon's literary property produced specifically for television presentation. Pursuant to a Memorandum of Agreement dated January 14, 1972, between Fox and CBS, Fox was required to produce the "programs" in 16mm or 35mm or other gauge film or on videotape or in any other medium selected by CBS. (Attachment A, JA 140) CBS offered each of its affiliate stations what was described as a "new television series based on the book by Margaret Landon which previously has been turned into both a successful movie and a successful Broadway musical." (Attachment B, JA 144)

With full knowledge of Mrs. Landon's rights in the book and in the copyright therein, but without consent or license from her and without any consideration to her, CBS provided the facilities of its network on a weekly basis, from September 17 to December 31, 1972, and actually telecast thirteen episodes of the television series "Anna and the King" over some one hundred and ninety stations constituting the Columbia Broadcasting System. None of the episodes was made for initial presentation in a motion picture theater, nor was any

such presentation made prior to the telecast of the series.

Each of the episodes in the series was represented by defendants to be "Based on the Biography by Margaret Landon . . . and 'Developed for Television by Bill Idelson and Harvey Miller.'" The sound track of each episode contained frequent bursts of dubbed audience laughter which were heard by television viewers on an average of more than once per minute. The length of each episode was approximately twenty-five minutes.

The television series was not well received by the public (see Attachment N, JA 452) and it was discontinued in the United States after the December 31, 1972 episode.

SUMMARY OF ARGUMENT

The District Court should not have determined on a motion for summary judgment that the Landon-Fox motion picture contract granted Fox the right to make a series of television programs. This case raises questions as to the intention and understanding of the parties, inferences to be drawn from the facts, and the meaning of technical language and trade custom, which could only

have been resolved against Mrs. Landon by a trial on the merits.

Appellees' motion for summary judgment (JA 121) asserted that the Landon-Fox contract was clear on its face and that by its language it granted Fox the right to make the television series in question. The only affidavit accompanying the motion was a brief one by one of Appellees' counsel. Mrs. Landon's cross-motion for summary judgment (JA 468) adduced Mrs. Landon's intention to retain television rights of the type in issue and sought to establish that the technical language of the 1944 agreement, construed in accordance with the custom of the motion picture and television industries and with Fox's own contracting practices, evinced a similar intention by Fox to acquire only the right to produce "motion picture versions," as opposed to "television versions" such as the television series in question. Her cross-motion was accompanied by three affidavits and comprehensive attachments. At this stage, Appellees opposed these assertions by Mrs. Landon by submitting counter-affidavits disputing what Mrs. Landon claimed was her intention and alleging that the Fox contracting practice upon which Mrs. Landon relied for evidence as

to Fox's intention in 1944 was attributable to the different drafting styles of Fox's East Coast and West Coast legal offices.

With the case thus cast for decision on cross-motions for summary judgment, the District Court reasonably could have drawn one of two conclusions. The Court could have held that the agreement, as interpreted in the light of the industry custom and usage established by Mrs. Landon's submissions, supported Mrs. Landon's claim, notwithstanding assertions by other individuals of what Mrs. Landon's intention might have been and regardless of which of Fox's own legal offices may have drafted certain agreements. Or the Court could have held that Fox's counter-affidavits created genuine issues of material fact concerning the intention of the parties at the time of contracting and that those issues would have to be tried. In no event, however, could the District Court reasonably have concluded on the state of the record before it that assertions made in counter-affidavits submitted to defeat Mrs. Landon's cross-motion for summary judgment were "undisputed" and dispositive of any factual controversy. Yet, that is precisely what the District Court did. It accepted

representations in counter-affidavits as evidence of facts when indeed they were evidence only of factual disputes.

The District Court assumed its own conclusion at the outset of its decision and accordingly never reached the real issue in this case. At page 5 of its opinion (JA 484), the Court declared:

"It is evident that the grant clauses [of the Landon-Fox agreement] are broadly drafted and do not contain or suggest the purported distinction between motion pictures made for first exhibition on television and those made for theater presentation."

Mrs. Landon contends that there was a clear-cut distinction in the trade, known to the parties, between a motion picture as an art form for the theatrical market (known as a "motion picture version") and a series of television programs, whether on film or live or otherwise for the television market (known as a "television series" or "television versions"). Mrs. Landon has never disputed that any motion picture version produced pursuant to the Landon agreement could later be shown on television.

Furthermore, Mrs. Landon did not and does not now argue (as implied by the District Court (Op., p. 7,

JA 486)) that she reserved the right to exhibit motion pictures on television. She reserved no right to make, produce or exhibit motion picture versions. The issue which the Court below unfortunately failed to reach is whether a television series on film (which could have been on videotape) is embraced within the term "motion picture version." We claim that it definitely is not, and that only Mrs. Landon had the right to make, produce, or exhibit television versions, including a television series whether live, on tape, or on film. The District Court confused the art form for theatrical release (motion picture) with one method of recording a television program (on film) and erroneously held on summary judgment that "motion picture versions" and "television versions" are synonymous terms. A trial would establish that the parties were well aware of the distinction and that they regarded it, in Justice Holmes' phrase, as "the implied assumption of the contract."^{4/}

^{4/} Manners v. Morosco, 252 U.S. 317, 326 (1920).

ARGUMENT

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED TO APPELLEES ON THE FIRST COUNT OF THE COMPLAINT SINCE THE RECORD CONTAINS NUMEROUS GENUINE ISSUES OF MATERIAL FACT THAT MUST BE TRIED.

The principal question before this Court is whether the District Court, under Federal Rule of Civil Procedure 56, properly denied Mrs. Landon a trial on her copyright infringement and breach of contract claims. If "there is the slightest doubt as to the facts," then the answer must be in the negative. Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944); Arenas v. United States, 322 U.S. 419, 434 (1944); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962); Empire Electronics v. United States, 311 F.2d 175 (2d Cir. 1962).^{5/} The party moving for summary judgment bears an extremely heavy burden of

^{5/} Notably, the Counterstatement submitted by Appellees (JA 475) pursuant to Local General Rule 9(g) of the District Court in opposition to Mrs. Landon's cross-motion for summary judgment defines the very issues of material fact that the District Court improperly resolved in Appellees' favor. See Kennyvonne Music, Inc. v. Columbia Broadcasting System, Inc., 150 U.S. P.Q. 785, 786 (S.D.N.Y. 1966).

proof. Poller v. Columbia Broadcasting System, Inc.,
supra, at 473; Van Brode Milling Co. v. Kravex Mfg.
Corp., 21 F.R.D. 246, 249 (E.D.N.Y. 1957). Indeed, the
Supreme Court has indicated:

"On summary judgment the inferences to be
drawn from the underlying facts contained
in such materials must be viewed in the
light most favorable to the party opposing
the motion." United States v. Diebold,
Inc., 369 U.S. 654, 655 (1962).

As support for its dismissal of the complaint on
summary judgment, the District Court mistakenly relied
on the following types of cases: (i) Appellate decisions
following a trial of the issues on the merits; (ii)
Cases involving theatrically released motion pictures
which were later telecast; (iii) Cases in which the
original parties to a contract were no longer available
to testify as to what was intended; and (iv) Cases in-
volving contracts which were worded differently from
the contract in the present case.^{6/} In the instant
case, there has been no trial, none of the television
productions had been exhibited in motion picture
theaters previously, key witnesses are still living

^{6/} The cases principally relied upon by the District
Court are discussed in detail and distinguished at
pertinent points infra.

and profess to have distinct recollections of what transpired, and the language of the Landon-Fox agreement is distinctive compared to that in other cases. Judicial language wrenched from the factual contexts of cases which are materially different from the immediate case should not be used to resolve present factual controversies so as to deny Mrs. Landon a trial on the merits of her claim.

Since the appropriateness of summary judgment must ultimately rest on the facts of a given case, First National Bank of Arizona v. Cities Services Co., 391 U.S. 253, 285-88 (1968); Dawn v. Sterling Drug, Inc., 319 F. Supp. 358, 361 (C.D. Cal. 1970), it becomes necessary to proceed to an examination of the crucial factual assertions in this action.

A. The Contract Between Fox and Mrs. Landon

1. The Terms of the Agreement

Under the first article (the grant clauses) of the 1944 agreement between Mrs. Landon and Fox (Exhibit A to the Complaint, JA 14), the following pertinent rights were conveyed to Fox:

"(a) The sole and exclusive motion picture rights and motion picture copyright throughout the world in and to said literary

property [plaintiff's book ANNA AND THE KING OF SIAM].

* * *

"(c) The sole and exclusive right to make, produce, adapt, sell, lease, rent, exhibit, perform and generally deal in and with and copyright motion picture versions of said literary property, with or without sound accompaniment and with or without the interpolation of musical numbers therein, and for such purposes to adapt one or more versions of said literary property, change the sequence thereof, change the title of said literary property, use said title, or any of its components, in connection with works or motion pictures wholly or partially independent of said literary property, change the characters in said literary property, change the descriptions of the said characters, and use all thereof in new versions, adaptations and sequels in any and all languages, and to register and obtain therein, throughout the world.

* * *

"(f) The sole and exclusive right to broadcast by means of the method generally known and described as television, or any process analogous thereto, any of the motion picture versions of said literary property produced pursuant hereto. The owner [plaintiff] specifically reserves to herself the right to broadcast the literary property by television direct from living actors; provided, however, that the Owner agrees that, for a period from the date hereof until eight (8) years after the date of general release of the first motion picture produced by the Purchaser based upon the literary property, or until ten (10) years after the date hereof, whichever period first expires, she will not exercise or grant the right to broadcast the literary property,

or any part thereof, by television, or by any other device now known or hereafter to be devised by which the literary property may be reproduced visually and audibly for an audience not present at a performance thereof and with living actors speaking the roles thereof. The Owner grants to the Purchaser the exclusive option to license, lease and/or purchase said reserved rights to broadcast the literary property by television from living actors, or otherwise, at the same price and upon such bona fide terms as may be offered to the Owner by any responsible prospective buyer and which shall be acceptable to the Owner" (JA 18-20) (Emphasis added.)

The third article of the agreement provides that

"It is the purpose of this agreement and the intention of the Owner [plaintiff] to transfer to the Purchaser [Fox] only the rights hereinabove conveyed and granted, and the Owner does hereby specifically reserve unto herself all other rights in and to said literary property." (JA 21)

The ultimate questions posed by this case are, simply stated, what did Mrs. Landon give to Fox and what did she retain under the 1944 agreement? Under the plain language of the instrument in issue, Mrs. Landon gave Fox the right to make "motion picture versions" of her book and then to telecast such "motion picture versions." She "specifically" retained her right to televise the literary property direct from living actors, but restricted the exercise of that right for a maximum of ten

years. And she gave Fox a right of first refusal on any conveyance of her reserved rights to televise the literary property "from living actors, or otherwise."

Thus, the focal points of the present litigation should have been, first and foremost, the meaning of the words "motion picture versions," and, secondarily, the significance of the words "specifically," and "from living actors, or otherwise." The record shows that the use of these words by the parties -- particularly by Fox, whose legal department drafted the 1944 agreement -- and the failure of the parties to use certain other terms frequently used by Fox in similar agreements, were intended to and, in fact, did convey a very precise negative meaning: Fox never received any right under the 1944 agreement to make "television versions" of Mrs. Landon's literary property, such as it acquired in numerous contracts with other authors during the same period. Unlike the Landon agreement, these other contracts would cover a television series such as "Anna and the King" in which each of the thirteen episodes was a production on film made especially for television presentation, even to the extent that frequent audience laughter was dubbed in.

This is not an action involving a subsequent use of a new medium unanticipated by one or both of the parties at the time the contract was made. In this case, both Mrs. Landon and Fox were well aware of the medium of television. (See Attachment E(1), JA 151; Landon Deposition, p. 122, JA 57)

Nor is this a problem of resolving an ambiguity in the language of an agreement. The term "motion picture versions" had a specific technical meaning to the parties to the Fox-Landon agreement. The specific technical meaning is to be ascertained not by a literal reading out of context, but by reference to the custom and usage in the industry and to evidence bearing upon the intention and understanding of the parties.

2. The District Court Improperly Disregarded Custom and Usage in the Industry to Interpret Technical Terms of the Landon-Fox Agreement.

The phrase "motion picture versions" is a technical term used widely in the entertainment industry in contradistinction to the term "television versions," which also has a distinct technical connotation. Appellees successfully urged the District Court to adopt a simplistic view of a television series as merely an

aggregation of movies shown on television. Yet, custom in the trade makes a clear technical distinction between films made principally for each of the two media, theaters and television. This trade distinction is reflected in Fox's own corporate annual reports and materials filed with the Securities and Exchange Commission. (Attachment H, JA 397) For example, the Fox 1970 Form 10-K filed with the SEC described Fox's business as follows:

"The most important phase of the Company's business is the production and financing of feature motion pictures designed first for theatre exhibition and then in most cases for television release, and of subjects initially designed for television exhibition. The feature motion pictures for theatrical exhibition are produced at the Company's studio in Los Angeles, California, and from time to time on location in other parts of the United States, Great Britain, and other countries as the story background suggests. Subjects produced for television are usually produced in Los Angeles, California.

"Feature films are generally those which run for one hour or more. Subjects produced for television normally have been produced for series of half hour or one hour programs." (Emphasis added.) (Attachment H, JA 402) 7/

7/ Fox also has stated that:

"The Company produces, alone or in association with others, film series specifically for television presentation over an extended period of weeks."

[Footnote continued on following page]

Indeed, Judge Dawson of the same District Court below acknowledged this distinction in his description of "The

[Footnote continued from preceding page]
(The above and foregoing statements are repeated in the 1971 and 1972 Forms 10-K.)

Fox's 1972 Annual Report to Shareholders showed the following items, among others, under the heading "Revenues" in its statement of consolidated earnings:

Feature films [Note 1(c) and 14]
Television programs [Note 1(c)]

"Note 1(c) THEATRICAL AND TELEVISION REVENUES

Revenues from theatrical exhibition of feature films are recorded after the film is exhibited and is billable to the exhibitor. Revenues and related expenses from licensing theatrical films for network television exhibition are recognized upon execution of contracts. Revenues from other television exhibition are recognized in accordance with the invoicing terms of the related agreements."

"Note 14. REVENUES FROM LICENSING FEATURE FILMS TO TELEVISION

Revenues from licensing theatrical feature films for television exhibition aggregated approximately \$19,191,000 in 1972 and \$21,200,000 in 1971. . . ."

In Fox's 1954 Annual Report, President Skouras stated:

"In order to take full advantage of television, we have launched TFC Television Productions, Inc., a wholly-owned subsidiary, for the purpose of making television films
[Footnote continued on following page]

Nature of the Television Industry and the Use Therein of Feature Films" in United States v. Loew's Inc., 189 F. Supp. 373 (S.D.N.Y. 1960), remanded for modification of decree, 371 U.S. 38 (1962): "Motion picture films were in direct competition with all other types of television entertainment, including live shows, taped shows and films made especially for television presentation."

(Emphasis added.)^{8/} In the present case, "motion

[Footnote continued from preceding page]
for sponsors and for developing television shows that will create greater interest in Hollywood and the motion picture theatres."

(It should be noted that Mr. Skouras referred to "television films," not "motion picture films.")

The 1963 Annual Report to Stockholders, for instance, broke down income from film rentals into three categories: Feature Motion Pictures and Short Subjects; Feature Pictures Licensed for Television; Film Series Produced Specifically for Television. (Emphasis added.)

8/ "The motion picture industry and the television industry, they are two distinct and separate instrumentalities." Spyros Skouras, President of Fox at the time of the Landon agreement, quoted with approval by Yankwich, C.J., in United States v. Twentieth Century-Fox Film Corporation, 137 F. Supp. 78, 110 (S.D. Cal. 1956). In Davis v. E. I. DuPont de Nemours & Co., 240 F. Supp. 612 (S.D.N.Y. 1966), the Court referred to the involvement of "four different media of expression" -- the novel, the theater, moving pictures and television. Id. at 617.

picture versions" was intended by the parties to the Landon-Fox contract to mean motion picture films made for theatrical exhibition and not programs recorded on film specifically for TV presentation, especially when such television films comprise that unique vehicle known as a "television series."^{9/} Indeed, when CBS and Fox contracted with each other for the production of the television series at issue in this case, they did not once use the term "motion picture." Instead, they

^{9/} The District Court noted, "parenthetically," that both the copyright law, and related regulations, and the Copyright Office publication The Compilation [Compendium] of Copyright Office Practices define "motion picture" to include "filmed television plays" or filmed pictures "transmitted by means of television," respectively. (Op., p. 13-14, JA 492-93) We note, also parenthetically, that there is no separate category in the archaic copyright classification system for any forms of television, whether produced on motion picture film or other recording media. (See discussion in NIMMER ON COPYRIGHT, § 25.3). The regulations of the Copyright Office describe the Compendium as "an administrative staff manual . . . for the general guidance of its staff in making registrations and recording documents." (37 C.F.R. § 201.2(b)(3)) Thus, classification of the television productions in the series for copyright registration purposes has no relation to interpretation of the intent of the parties in the written agreement. Cf. Warner, Radio & Television Rights (1953), Section 52 ("Although the definition of 'radio communications' in the Communications Act of 1934 comprehends television, it is believed that television rights are separate and distinct from radio as well as motion picture rights.").

referred twenty-one times to "programs" and fourteen times to "pilots."^{10/}

The technical connotation of language used in an agreement is, of course, pertinent to contractual interpretation under the prevailing view in this Circuit and elsewhere. See, e.g., Franklin Research & Development Corp. v. Swift Electrical Supply Co., 340 F.2d 439 (2d Cir. 1964); Von Tilzer v. Jerry Vogel Music Co., 53 F. Supp. 191 (S.D.N.Y. 1943), aff'd sub nom, Gumm v. Jerry Vogel Music Co., 158 F.2d 516 (2d Cir. 1946) ("every printed copy sold" in royalty provision constituted "technical" term justifying reliance on explanatory, extrinsic evidence); Armour and Co. v. Celic, 294 F.2d 432 (2d Cir. 1961).^{11/}

^{10/} Attachment A, JA 140.

^{11/} The District Court mistakenly relied upon Bartsch v. Metro Goldwyn-Mayer, Inc., 391 F.2d 150 (2d Cir.), cert. denied, 393 U.S. 826 (1968), in refusing to interpret the technical language of the contract. (Op., p. 8, JA 487) The Bartsch case is inapposite for many reasons. First, that case was not decided on a motion for summary judgment, but after a trial before District Judge Bryan. (Hollywood Plays, Inc. v. Columbia Pictures Corp., 77 N.Y.S. 2d 568 (Sup. Ct. N.Y. Co. 1947), aff'd, 274 App. Div. 912 (1st Dept. 1948), rev'd on other grounds, 299 N.Y. 61 (1949), and Autry v. Republic Productions, Inc., 213 F.2d 667 (9th Cir. 1954), cert. denied, 348 U.S. 858 (1954), cited by the District

[Footnote continued on following page]

As declared by the court in Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1048 (5th Cir. 1971):

"Evidence to . . . establish a custom, or show the meaning of technical terms, and the like, is not regarded as an exception to the general rule, because it does not contradict or vary the written instrument, but simply places the court in the position

[Footnote continued from preceding page]
Court (Op., p. 14, JA 493) are similarly distinguishable.) Secondly, the court in Bartsch considered the question of whether a motion picture made for theatrical exhibition could be subsequently telecast -- a matter not at all at issue in the present case. (Wexley v. KTTV, Inc., 108 F. Supp. 558 (S.D. Cal. 1952), aff'd, 220 F.2d 438 (9th Cir. 1955), also relied upon heavily by the District Court (Op. p. 7, JA 486), is likewise inapposite. The case involved a theatrical motion picture entitled "The Last Mile". Moreover, the contractual language was entirely different.) Thirdly, the Fox-Landon agreement contains no ambiguity, the resolution of which was the principal concern of the Bartsch court. And finally, in the immediate case almost all of the individuals involved in the negotiations for the contract are alive and purport to recollect the material events leading up to the execution of the contract. As noted by the court in Bartsch, this is sufficient to reject the approach taken by the District Court. As a matter of fact, the Court below apparently disregarded the sentence preceding the portion of the Bartsch decision quoted in the decision which encourages a reconstruction of the parties' intention when that is possible:

"With Bartsch dead, his grantors [the authors] apparently so, and the Warner brothers lawyer understandably having no recollection of the negotiation, any effort to reconstruct what the parties actually intended nearly forty years ago is doomed to failure." 391 F.2d at 155.

of the parties when they made the contract, and enables it to appreciate the force of the words they used in reducing it to writing."

This view is shared by Professor Corbin, who observed:

"[S]ome of the surrounding circumstances always must be known before the meaning of the words can be plain and clear; and proof of the circumstances may make a meaning plain and clear when in the absence of such proof some other meaning may also seem plain and clear. . . ." 3 Corbin on Contracts § 542, at 100-05.

Both the Supreme Court and this Circuit have expressed support for Corbin's common-sense view. In Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943), the Supreme Court reversed an appellate court's refusal to examine the legislative history of a supposedly "unambiguous" statute, and declared:

"[W]ords are inexact tools at best, and for that reason, there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination." 12/

12/ See also Massachusetts Bonding & Insurance Co. v. United States, 352 U.S. 128, 138 (1956) wherein Justice Frankfurter in his dissenting opinion declared:

"'There is no surer way to misread a document than to read it literally' [Citation omitted] Of course, one begins with the words of a statute to ascertain its meaning, but one does not end with them. The notion that the plain meaning of the words of a statute defines the meaning of a statute reminds one of T. H. Huxley's gay observations that at times 'a theory survives long after its brains are knocked out.'"

Similarly, herein, where the intent of contracting parties (rather than Congress) is at issue, the terms of the contract can only be interpreted in light of their background, as provided by trade or industry custom. To do otherwise, as Professor Corbin notes, would be to substitute the court's own linguistic education and experience for that of the contracting parties with the attendant danger of making a contract for the parties which they themselves did not intend. 3 Corbin on Contracts § 542 at 111-12.

Additional support for Professor Corbin's view has come from Judge Friendly who acknowledged this Court's "growing appreciation . . . that words are seldom so 'plain and clear' as to exclude proof of surrounding circumstances and other extrinsic aids to interpretation. . . ." Meyers v. Selznick Co., 373 F.2d 218, 222 (2d Cir. 1966).

B. Mrs. Landon's Intention and Her Understanding of Fox's Intention in 1944

1. Proof of Mrs. Landon's Intention and Understanding in the Record Before the District Court

Precisely what, then, did Mrs. Landon and Fox intend when they executed an instrument conveying to Fox the right to produce and telecast "motion picture versions"

of ANNA AND THE KING OF SIAM? According to Mrs. Landon, her intention and her understanding of Fox's intention were clear. She granted Fox the right only to make feature length motion pictures for presentation to theater audiences and to subsequently telecast such motion pictures. Conversely, she definitely did not intend to convey to Fox any right to make television programs, whether or not on film, for initial presentation to a television audience, such as is most clearly the case with a television series. She was assured by her experienced agents that the negotiations with Fox had succeeded in retaining all television rights for her, except the right to telecast a motion picture made originally for theatrical release. Her intention and her understanding of Fox's intention were made abundantly clear by Mrs. Landon at her deposition:

"Q. [by counsel for defendants] Returning to the October [1944] meetings with Mr. Schneider and Miss Strauss [employees of the William Morris Agency], was there any discussion specifically of television rights, to your recollection, in those meetings?

"A. [by Mrs. Landon] Yes. That was at my insistence. I specified those that I wanted. I had a very strong feeling about them."
(Landon Deposition, p. 122, JA 57)

* * *

"Q. I believe your testimony was -- and I want to be precise on this -- that you were informed prior to the signature by you of the contract [the 1944 agreement with Fox] that they [the William Morris Agency] had secured all subsidiary rights?

"A. Yes.

"Q. Who so informed you?

"A. Mr. Schneider.

"Q. In a phone call?

"A. Yes." (Landon Deposition, p. 137, JA 60)

At still another place in her deposition, Mrs. Landon noted that she had "read the entire contract carefully" before signing it and that she "had assurances from my agent that I retained television rights." (Landon Deposition, p. 160, JA 64) Similarly, with regard to the television broadcast clause of the agreement, the following colloquy ensued:

"A. [by Mrs. Landon] I sold only the right to show a feature length motion picture made originally for showing in a motion picture theater on television.

"Q. And with respect to the other television rights, it is your position that you retained those under the agreement?

"A. That is my position."

* * *

"Q. In the context of your position did this provide you any rights to place motion picture versions of this literary property on television?

"A. No feature length motion picture prepared for a motion picture theater.

"Q. So you had granted those rights and did not retain those rights?

"A. The specific right, the specific right to show a motion picture feature length intended to be shown in a motion picture theater. All other rights I retained." (Landon Deposition, pp. 162-64, JA 65-67)

Finally, Mrs. Landon succinctly summed up her understanding of what she had conveyed by the 1944 agreement in the following statement:

"The only television right that I granted to Twentieth Century-Fox was that of showing the theater-length motion picture made for presentation in a motion picture theater that they were about to make. I granted to them the right to show that specific motion picture on television, nothing else." (Landon Deposition, p. 408, JA 76) 13/

13/ In a file memorandum prepared about a year after her contract with Fox, Mrs. Landon explained why she had preferred the Fox agreement to a Theater Guild contract for a Broadway production. One reason was that the "movie contract left me all the subsidiary rights, radio, television, even stage," while the Guild contract provided for 40% of the motion picture rights and 40% of the radio and television rights to go to the Guild. Landon Dep. Ex. 29, JA 90. See also Ex. 19, p. 4, JA 85, under heading "Eighth: Subsidiary Rights."

And with regard to Fox's right to make sequels, Mrs. Landon explained, "the sequels were limited, according to my understanding, as contained in information conveyed to me by Mr. Schneider . . . the sequels could only be motion pictures made for showing in motion picture theaters." (Landon Deposition, p. 241, JA 70)

Likewise, the theatrical agent that represented Mrs. Landon during the negotiation of the 1944 agreement (the William Morris Agency in the person of Mr. Albert B. Schneider, now Albert B. Taylor) had full knowledge of Mrs. Landon's interest in this regard and secured an agreement for her consistent with that interest. As described by Mr. Taylor in paragraph 5 of his affidavit of June 3, 1974:

"As I recall the negotiations and terms of the December 8, 1944 contract, the rights granted to Fox were customary motion picture rights. Under the terms of the Fox agreement, the motion picture versions authorized by the contract -- i.e., full-length feature movies produced for theatre audiences -- could later be shown on television. However, it was not Mrs. Landon's intention as expressed to me, nor did I negotiate for her, any sale of the right to make television versions -- i.e., productions made especially for television and not for initial theatre audience consumption. Mrs. Landon specifically directed me not to sell any subsidiary rights, which would include any television rights. It was Mrs. Landon's intention, as well as ours at the

William Morris Agency in representing her, that such subsidiary rights were to remain with Mrs. Landon and that Fox was to receive only the right to produce and, if it wished, subsequently televise, its motion pictures and any rights necessary to exploit its motion pictures. This was understood by Fox's representatives and is the obvious reason for the absence of any reference to 'television versions' in the grant clause of Mrs. Landon's agreement with Fox. (JA 128) (Emphasis added.)

2. The District Court's Improper Resolution of Several Issues of Material Fact Concerning Mrs. Landon's Intention in 1944

In response to the foregoing assertions by Mrs. Landon, the District Court held the following (Op., pp. 14-15, JA 493-494):

"Plaintiff also argues that it was not her intention to grant to Fox the right to make television versions of the property. She takes the position that her intentions in 1944 present an issue of disputed fact requiring a trial on the merits. The argument is wide of the mark for two reasons. First, it is axiomatic that evidence of plaintiff's intent is admissible only insofar as it was expressed to Fox. Her affidavit is silent on the question whether she ever expressed to Fox in 1944 the construction of the agreement she presses on the present motions, and it is undisputed that she had very little, if any direct contact with Fox at all. Albert B. Taylor, an executive with William Morris Agency (plaintiff's literary agents) with some familiarity with the negotiation of the 1944 agreement, does not state that he, or any other employee of the Agency communicated Landon's understanding of the agreement to Fox. More to the point,

the opposing affidavit of Helen Strauss, who was personally responsible for plaintiff's account and for negotiation on Landon's behalf of the Fox agreement, states that in 1944 Strauss understood the agreement to convey to Fox all film rights, including television rights, while reserving to Landon 'dramatic rights,' including the right to televise a 'live' dramatic rendition of the property."

The District Court erred in many respects. In the first place, we did not take the position before the District Court that Mrs. Landon's intention in 1944 presented an issue of disputed fact requiring a trial on the merits. There was no reason to believe, at the time Mrs. Landon's cross-motion for summary judgment was submitted, that anyone would question what Mrs. Landon's intention was in 1944. In support of Mrs. Landon's motion in this respect we offered her deposition testimony and Mr. Taylor's affidavit as previously quoted. It was the counter-affidavit of Helen Strauss submitted by Appellees to defeat Mrs. Landon's motion for summary judgment that created this issue of fact. Thus, as the record now stands and as it existed before the District Court, there is a genuine issue of material fact concerning Mrs. Landon's intention in 1944, and that issue should not have been resolved by summary judgment.

Second, the District Court's description of Mr. Taylor as having had "some familiarity with the negotiation of the 1944 agreement" is a gross and inaccurate understatement. Mrs. Landon's deposition (see pp. 65, 72, 83-84, 92, 98, 99, 422-24, JA 45, 46, 48-49, 50, 51, 52, 79-81) and Mr. Taylor's affidavit (at ¶ 3, JA 127) both designate Mr. Taylor as having had principal responsibility for the negotiation of the contract. Conversely, the Court's conclusions for purposes of summary judgment that Miss Strauss was personally responsible for the negotiation of the 1944 agreement is similarly erroneous. At the very least this is also an issue of fact that must be tried.

Third, the District Court erred in concluding that Mrs. Landon's intention to retain the television rights in the book was not communicated to Fox. As quoted above, Mr. Taylor declares unequivocally and emphatically in his affidavit that Mrs. Landon's intention "was understood by Fox's representatives." Miss Strauss' affidavit, on the other hand, states that it was her understanding that the agreement did not reserve such rights to Mrs. Landon. The District Court accepted this assertion of hers, in combination with its unwarranted conclusion that Miss Strauss was solely responsible for the negotiations, to resolve the

issue of fact against Mrs. Landon. The Court's action was improper in the context of summary judgment. Even the matter of what Miss Strauss' "understanding" might have been is hotly disputed by Mrs. Landon in her deposition (see pp. 82-84, 100, 106, 108-09, 122, 134-35, 137-40, 178, 241, 246-47, 408, JA 47-49, 53, 54, 55-56, 57, 58-59, 60-63, 68, 70, 71-72, 76).

The foregoing issues of fact -- namely, what was Mrs. Landon's intention and her understanding of Fox's intention in 1944; who really negotiated with Fox; was Mrs. Landon's intention to reserve television rights actually communicated to Fox; and did Fox understand Mrs. Landon's intention -- were all raised by Helen Strauss' counter-affidavit that was submitted by Appellees to defeat Mrs. Landon's motion for summary judgment. At the very least, a resolution of these issues requires a judgment on Miss Strauss' credibility. See Harris v. Fawcett Publications, Inc., 176 F. Supp. 390, 393 (S.D.N.Y. 1959).

Mrs. Landon's deposition is replete with references to the untruthfulness of Miss Strauss. For example, Mrs. Landon noted that "Helen lied to me so many times that I lost confidence in her. . . . [S]he had explained to me at the very beginning that in her profession the ability to lie successfully was important. . . ." (Landon

Deposition, p. 352, JA 73) Indeed, Mrs. Landon terminated her relationship with the William Morris Agency partially because of "misrepresentations . . . by Miss Strauss" (id. at 390-91, JA 74-75). Significantly, however, Mrs. Landon testified that Miss Strauss' misrepresentations became apparent subsequent to the 1944 agreement with Fox when Miss Strauss became interested in the advancement of her own career (id. at 411-12, JA 77-78). That self-interest exists today in the form of Miss Strauss' close association with the motion picture industry, generally, and Fox, in particular, as head of the film division of Readers Digest (see Strauss affidavit, dated June 26, 1974, ¶ 2, JA 470). Albert Taylor is presently retired in Mexico and beholden to no one.

The credibility even of uncontroverted witnesses is often a matter to be reserved for trial. In the present circumstances it is inconceivable that Helen Strauss' credibility could be summarily resolved in her favor.

The summary judgment procedure does not contemplate a trial by affidavits. Sartor v. Arkansas Natural Gas Corp., supra; Eccles v. Peoples Bank of Lakewood Village, Cal., 333 U.S. 426, 434 (1948); Colby v. Klune, 178 F.2d 872 (2d Cir. 1949).

"[W]here there is any possibility that an issue of fact is presented, the opposing

party should have the opportunity to cross examine movant's witnesses and the trier of the facts should have the opportunity to evaluate their credibility by observing their demeanor while they testify."
Hammond (C.S.) & Co. v. Int'l College Globe, Inc., 146 F. Supp. 514, 516 (S.D.N.Y. 1956) (Kaufman, J.).

The discrepancy between the affidavits of Taylor and Strauss probably arose as a result of one of two possibilities: someone either was giving false testimony, or did not truly remember or comprehend the facts and occurrences attendant upon the 1944 contract. Indeed, it is because of the high likelihood that such factual disputes may occur in copyright infringement and plagiarism related suits that these types of actions usually must be resolved by a trial on the merits. Arnstein v. Porter, 154 F.2d 464, 474 (2d Cir. 1946); Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939); MacDonald v. Du Maurier, 144 F.2d 696, 701 (2d Cir. 1944).

As previously noted, where affidavits, depositions, and other extraneous materials seem to rise or fall upon the credibility of the witnesses from whom they are evoked, there must be a trial so that the trier of fact will have an opportunity to observe the witnesses' demeanor:

"... the affidavits do not supply all the needed proof. The statements in defendants'

affidavits certainly do not suffice, because their acceptance as proof depends on credibility; and -- absent an unequivocal waiver of a trial on oral testimony -- credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important elements of witnesses' demeanor." Colby v. Klune, supra, at 873; Arnstein v. Porter, supra, at 471.

C. Fox's Intention and Understanding
of Mrs. Landon's Intention in 1944

1. Proof of Fox's Intention and Understanding
in the Record Before the
District Court

Mrs. Landon did not limit herself before the District Court to proving Fox's intention by analysis of the 1944 agreement, by interpretation of its key provisions in light of trade custom, and by her own and Albert Taylor's understanding. She also took the position that Fox's intention could be established beyond any question by an examination of Fox's contracting practices prior to, during and after its negotiation of her contract. Based upon a substantial number of agreements produced by Fox during the discovery phase of the present proceeding, it seemed clear that when Fox intended to secure the type of television rights at issue in the instant case, it knew precisely how to do so and, in fact, did so by the use of explicit language when the author was willing to

convey such rights. Fox did not do so in Mrs. Landon's case.

The use of other agreements executed by one of the parties to a contractual dispute as evidence of intention underlying the contract in question or as a guide in construing technical terms is quite common. The New York case of Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 594 (N.Y. Sup. Ct.), aff'd, 269 N.Y.S.2d 913 (App. Div.), aff'd, 18 N.Y.2d 659 (Ct. App. 1966), is strikingly in point. In that case, the issue before the court was whether or not a contract between motion picture producer Otto Preminger and Columbia Pictures Corp. gave Columbia the right to telecast Preminger's feature length theatrical motion picture "Anatomy of a Murder" with commercial interruptions and editing, as was the practice of the television industry.

Preminger admitted that when he signed the contract with Columbia, he was aware that the practice of the industry was to interrupt the telecast of such motion picture films for commercials and to make minor cuts. Nevertheless, Preminger did not specifically provide in the contract for conditions known to him to be prevalent in the industry at the time.

The important aspect of the Preminger case to the present controversy is that two earlier contracts between Preminger and another motion picture company, United Artists Corp., were relied on by the Court. These contracts pertained to "Man With a Golden Arm" and "The Moon is Blue," the last two pictures produced by Preminger prior to "Anatomy of a Murder," which he made for Columbia. As noted by the court:

"In both the contract for 'The Moon is Blue' and the contract for 'Man With a Golden Arm,' clauses appeared which demonstrate that Preminger was aware of the prevailing practice in the television industry with respect to interrupting motion pictures for commercials and making minor cuts therein for normal television purposes. These contracts further show that when Preminger desired to prevent television distribution in the normal manner, he so provided."

* * *

"Plaintiff's entry into the instant contract which failed to contain such a clause may be considered by the Court as evidence of the parties' intention. [Citations omitted.]" 267 N.Y.S.2d at 601-02. (Emphasis added.)

The first thing that should be borne in mind in assessing Fox's intention in the present case is that Fox's "Standard Form for Purchase of Literary Material" used during the 1940s contains the following operative grant in language which is word-for-word, without a

single change, the same as the language in Mrs. Landon's contract:

"(c) The sole and exclusive right to make, produce, adapt, sell, lease, rent, exhibit, perform and generally deal in and with and copyright motion picture versions of said literary property, with or without sound accompaniment and with or without the interpolation of musical numbers therein, and for such purposes to adapt one or more versions of said literary property, to add to and subtract from the literary property, change the sequence thereof, change the title of said literary property, use said title, or any of its components, in connection with works or motion pictures wholly or partially independent of said literary property, change the characters in said literary property, change the descriptions of the said characters, and use all thereof in new versions, adaptations and sequels in any and all languages, and to register and obtain copyright therein, throughout the world." (Emphasis added.) (Attachment C, JA 146)

This is the language used by Fox to acquire what is commonly referred to in the entertainment industry as "customary motion picture rights." Fox itself so characterized the rights it received from Mrs. Landon immediately after execution of the agreement. (See Attachment D, JA 149.) In addition to Mrs. Landon's contract, eight contracts produced by Fox pursuant to Mrs. Landon's discovery contain a grant of customary motion picture rights in which the right only to produce and then telecast

"motion picture versions" of the literary property
involved is conveyed.^{14/}

At the same time that Fox was utilizing the foregoing grant clause to acquire customary motion picture rights -- i.e., the right to make feature motion pictures for theatrical exhibition and incidental subsequent television broadcast of such motion pictures -- it was inserting in other contracts an expanded version of the clause to expressly include in the conveyance by the author the right also to make "television versions." This additional term, of course, would cover the production and telecast of programs recorded on film specifically for television presentation, such as a television series.^{15/}

^{14/} The cover sheets and pertinent clauses of these contracts are contained in Attachment E(1)-(8) (JA 150). Attachment E was indexed and each agreement numbered for the convenience of the Court. The assignment files of the Copyright Office reveal numerous other Fox contracts with the same limited grant.

^{15/} On occasion, as in Exhibits E(9) and (10) (JA 178 and 182), Fox used a separate television grant clause in addition to the standard "motion picture version" clause: "The sole and exclusive right, throughout the world, to project and/or broadcast the literary property or any parts or versions thereof by means of the method generally known and described as television or by any process analogous thereto, from living actors, motion pictures, film or other devices or by any other means now or hereafter

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In fact, in the four years between January 27, 1941, and the date of the Landon-Fox contract, Fox entered into at least thirty-eight other agreements in which Fox made express reference to "television versions," as well as to "motion picture versions," in the grant clause. In all other respects the basic grant clause of these agreements was identical to that of the
16/
Landon-Fox agreement.

[Footnote continued from preceding page]
utilized in connection therewith." Whereas the Landon contract referred to telecasting "any of the motion picture versions of said literary property produced pursuant hereto," these contracts referred broadly to telecasts of "the literary property or any parts or versions thereof." Moreover, unlike the Landon contract, these contracts specified that the telecasts might be "from living actors, motion pictures, film or other devices or by any other means now or hereafter utilized in connection therewith."

16/ The cover sheets and pertinent clauses of each of these agreements (as well as of a number of agreements demonstrating Fox's continued use of the "television versions" clause following the date of the Landon agreement) are contained in attachment F (JA 185). Attachment F was indexed and each agreement numbered for the convenience of the Court.

Illustrative of the clause used in these agreements is the following from the agreement of October 26, 1943, between Martha Cheavens and Fox for the literary property entitled EACH IN HIS WAY (attachment F(32), JA 306):

"The sole and exclusive right to make, produce, adapt, sell, lease, rent, exhibit, perform and generally deal in and with and copyright motion picture and television versions of said literary property, or any part

[Footnote continued on following page]

It is also noteworthy that in each of these thirty-eight agreements the preceding clause, relating to the right of sound reproduction, referred to "television productions" as well as to "motion pictures." That this language was selected by Fox deliberately is demonstrated by the absence of any comparable antecedent reference to

[Footnote continued from preceding page]

or portion thereof, and of the characters and characterizations therein contained, of every kind and nature, with or without sound accompaniment and with or without the interpolation of musical numbers therein, and for such purposes to adapt one or more versions of said literary property, to add to and subtract from the literary property, change the sequence thereof, use a portion or portions of said literary property, change the title of said literary property, use said title, or any of its components, in connection with works or motion pictures wholly or partially independent of said literary property, change the characters in said literary property, change the descriptions of the said characters, and use all thereof in new versions, adaptations and sequels in any and all languages, and to register and obtain copyright therein, throughout the world." (Emphasis added.)

Each of the thirty-seven other agreements previously noted which conveyed to Fox the right to make "television versions" or "television adaptations," in addition to the right to make "motion picture versions," of the literary work involved contain basic grant clauses identical in all material respects to the clause quoted above. (The other clauses of each of the thirty-eight agreements are so similar as to make it clear that they were based on a standard form used by Fox.)

"television productions" in agreements, including the Landon agreement, which convey only the right to make ^{17/} "motion picture versions" in the basic grant clause.

17/ In Mrs. Landon's contract with Fox, the clause concerned with the right of sound reproduction reads as follows:

"The sole and exclusive right, throughout the world, to mechanically produce, reproduce and license the reproduction of spoken words taken from and/or based upon the text or theme of said literary property, on records, films, or other devices designed and/or used for the purpose of producing and reproducing sound in synchronism with, accompaniment of or supplementary to motion pictures, using for that purpose all or a part of the theme, text and/or dialogue contained in said literary property." (JA 18) (Emphasis added.)

In contrast, the same clause in the Cheavens-Fox agreement declares the following:

"The sole and exclusive right, throughout the world, to mechanically produce, reproduce and license the reproduction of spoken words taken from and/or based upon the text or theme of said literary property, on records, films, or other devices designed and/or used for the purpose of producing and reproducing sound in synchronism with, accompaniment of or supplementary to motion pictures and/or television productions, using for that purpose all or a part of the text, theme, and/or dialogue contained in said literary property." (JA 308) (Emphasis added.)

The only time "television version" is mentioned in the Landon agreement is in clause (h) in connection
[Footnote continued on following page]

Accordingly, two conclusions seemed clear from the very contractual language selected by Fox in its various dealings with many different authors: First, there were, inter alia, two different rights available for purchase -- (i) the right to make television versions of a literary work and (ii) the right to make motion picture versions of such a work -- and, secondly, that in Mrs. Landon's case, Fox negotiated for and actually purchased only the right to make motion picture versions of ANNA AND THE KING OF SIAM. Fox could then telecast only such motion picture versions.^{18/}

[Footnote continued from preceding page]
with synopses for exploitation purposes. (" . . . from the said literary property or from any motion picture and/or television version thereof") (JA 20)
Clearly this is to cover both the contingency that Fox might have produced a television version with Mrs. Landon's permission by virtue of having exercised its right of first refusal under clause (f) and the contingency that Fox might want to exploit its theatrical motion picture by use of a synopsis of a television version. The District Court (Op., p. 10, JA 489), failed to catch the significance of this reference to "television version" within the context of clause (h).

^{18/} By an agreement (attachment I, JA 417), dated July 12, 1968, Fox acquired the rights to the book M*A*S*H, which, significantly, was made into, first, a motion picture for theatrical exhibition, and then a television series which was telecast by CBS in the time slot immediately following ANNA AND THE KING. The contrast between the contracts for M*A*S*H and for ANNA AND THE KING OF SIAM is striking. The M*A*S*H agreement contains a television rights clause which

[Footnote continued on following page]

Thus, Fox's own contracting practices firmly establish the intention of the parties in the present case (including Fox's understanding of Mrs. Landon's intention, as described by Mr. Taylor, supra, pp. 34 and 36) to convey to Fox only the right to make and subsequently telecast feature motion pictures made for initial theatrical exhibition.^{19/} Furthermore, this conclusion

[Footnote continued from preceding page]
is of far greater breadth than clause (f) of the Landon-Fox agreement. Yet, even with a clause that on its face would appear to contemplate a television series, Fox conspicuously added to the television rights clause of the M*A*S*H agreement, by footnote no less, the words "including television series rights." This underscores just how unique a product a television series was considered by Fox itself.

^{19/} The District Court also erred in trying to stretch the right to make "sequels," granted under clause (c) of the Landon agreement, into the right to produce a television series (see Op., pp. 11-12, JA 490-91). The "sequels" relate back to "motion picture versions" in the Landon agreement, just as the same word relates back to "television versions" in the agreements negotiated by Fox to cover such rights. Thus, the grant of the right to make "sequels" concerns only the number of productions that can be made. It has no bearing on the basic issue of whether motion picture versions are the same as television versions, regardless of how many of each may be produced under an agreement. (For a discussion of the difference between a motion picture sequel, a television sequel, and a television series, see Taubman, Performing Arts Management and Law (1972) at p. 436.)

Goodis v. United Artists Television, Inc., 425 F.2d 397 (2d Cir. 1970), relied on by the District Court, is not to the contrary. Although the absence of the

[Footnote continued on following page]

is supported by analysis of the television broadcast clause of Mrs. Landon's contract. That clause is so expressly tied to the grant of the right to make and telecast "motion picture versions" that no expansion of the basic conveyance was or could have been intended.

Under the television broadcast clause, Fox received the right to telecast any of the "motion picture versions" of Mrs. Landon's literary property that Fox produced. Mrs. Landon "specifically" reserved to herself the right to televise the work "direct from living actors."^{20/} The use of the word "specifically," rather than for example "solely" or "only," indicates that the television reservation is broader than simply the right to televise live productions,

[Footnote continued from preceding page]
right to make sequels was given as one of the reasons for reversal, this Court did not address itself to the question of the type of sequel rights which might be relevant. A grant of "all sequel rights" or of "motion picture and television sequel rights," for example, would have much broader connotation than a grant simply of "motion picture sequel rights." The Landon-Fox agreement contained the equivalent of the last and, therefore, did not include the right to make a television series.

^{20/} Notably, the reservation to an author of the right to televise the literary work "from living actors" and the grant to Fox of the right to make "television versions" are not mutually exclusive. For example, the Marsman-Fox contract of July 2, 1942, for the literary property entitled I ESCAPED FROM HONG KONG contains both provisions (see Attachment F(9), JA 216), as does an assignment dated August 2, 1943, by Joan Angel to Fox of rights in the literary work ANGEL OF THE NAVY (Attachment J, JA 441).

but that these productions were of such significance in 1944 that a clause explicitly addressing that right was considered necessary. Moreover, the time limitation on Mrs. Landon's ability to exercise her live television rights warranted isolating that right for special treatment.^{21/}

On the other hand, the language of the right of first refusal granted to Fox for the conveyance of the television rights reserved to Mrs. Landon reveals the greater breadth of the reservation by its reference to her "reserved rights to broadcast the literary property by television from living actors, or otherwise." Clearly, the phrase "or otherwise" denotes rights beyond those involved in making live television productions. It is precisely within that "otherwise" that the right to make non-live "television versions" falls -- a right which Fox chose not to acquire from Mrs. Landon and which it should not now acquire by judicial fiat.^{22/}

^{21/} There was no time limitation on Mrs. Landon's ability to exercise or convey her non-live television rights, provided she gave Fox a right of first refusal on any such exercise or conveyance.

^{22/} The District Court observed that our construction of Mrs. Landon's reservation of television rights beyond portrayals of her work from living actors is commercially unsound. To the contrary, Fox's right to first refusal
[Footnote continued on following page]

Underlying the District Court's decision is its statement (Op., p. 6, JA 485) that it was incumbent upon the author as grantor to specify with particularity the reservation of television rights. However, exactly the reverse is true as a matter of law. As the court held in the well-known "Sam Spade" case:

"The instruments under which Warner claims were prepared by Warner Bros. Corporation which is a large experienced moving picture producer. It would seem proper, therefore, to construe the instruments under the assumption that the claimant knew what it wanted and that in defining the items in the instruments which it desired and intended to take, it included all of the items it was contracting to take . . . As was said in Phillip v. Jerome H. Remick & Co., S.D.N.Y., Op. No. 9,999, 1936, 'Such doubt as there is should be resolved in favor of the composer. The clearest language is necessary to divest the author of the fruits of his labor. Such language is lacking here.'" Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc., 216 F.2d 945, 949 (9th Cir. 1954), cert. denied, 348 U.S. 971 (1955).

The language of clause (f) of the Landon-Fox agreement is certainly no model of clarity. But Mrs. Landon had no obligation to spell out precisely what she was not granting, especially in light of the third Article of the

[Footnote continued from preceding page]
for the exercise or conveyance of such rights more than adequately protected Fox from the commercial detriment of competing television versions.

agreement by which Mrs. Landon expressly reserved to herself all rights not specifically granted to Fox. It was Fox that wanted the three basic points covered by that clause (f): (i) the right to telecast its theatrical motion pictures; (ii) a time restriction on Mrs. Landon's exercise or grant of her live television rights; and (iii) a right of first refusal in connection with Mrs. Landon's exercise of any of her "other" reserved television rights.

Mrs. Landon's interpretation of her agreement of 1944 coincides with District Judge Feinberg's interpretation of a similar 1942 agreement with Warner Bros. in the case of Davis v. E. I. DuPont de Nemours & Co., 240 F. Supp. 612 (S.D.N.Y. 1965). The 1942 agreement had conveyed to Warner Bros. "the exclusive right to make motion picture versions" of the owners' novel and plays and the exclusive right to telecast "any and all motion picture photoplays" produced pursuant to the agreement. However, the owners had reserved "television rights direct from living actors and any and all other rights not specifically granted herein."^{23/} The Court construed

^{23/} Id. at n.14, referring to the plaintiff's exhibit 15.

the agreement as granting Warner Bros. "the right to show on television any film made pursuant to its terms. However, it did not grant the right to a televised production using live actors or any other television rights growing out of the properties involved." Id. at 616.

Thus, there was no reason for Mrs. Landon or her agent to delineate to Fox how her reserved television rights were to be protected. The deal was only for customary motion picture rights, not for basic television rights. Accordingly, Fox simply lifted, verbatim, the language used by it in comparable clauses of its previous contracts. (See, e.g., attachment E2, p. 4, JA 156 (the ^{24/} contract for CLUNY BROWN).)

^{24/} The District Court contrasted Mrs. Landon's requested prohibition of broadcast serial rights in clause (g) with her failure to request a similar prohibition in clause (f). The comparison, however, is inappropriate. Mrs. Landon obviously wanted to make sure that Fox did not use its permission for radio broadcasting for advertising purposes to make a radio serial using a succession of excerpts taken from the theatrical motion picture. There was no advertising authorization for television. Hence, there was no need to specify a restriction as to serialization. Moreover, the Court quotes (Op., p. 6, JA 485) out of context the provision in clause (g) which states that "[t]his restriction on broadcasting . . . shall not in any way affect or restrict the rights on television herein granted." This portion of clause (g) merely establishes a different time frame for the exercise of Mrs. Landon's reserved radio rights from the exercise of her various reserved television rights. From Fox's point of view, it meant that Fox could telecast the theatrical motion picture without waiting for expiration of the two-to-four year restriction on radio broadcasting.

We should like to touch briefly upon one more point which the District Court failed to note. There was an agreement of April 20, 1950 (Exhibit 34 to Mrs. Landon's Deposition, JA 92), between Mrs. Landon and Richard Rodgers and Oscar Hammerstein ("R and H"). Pursuant to the R and H agreement, Mrs. Landon was eventually paid a sum of money by R and H for which she was restricted from exercising her television rights without R and H's permission.

The language of the R and H agreement, which was negotiated for Mrs. Landon by the same William Morris Agency in the person, significantly, of none other than Helen Strauss (see Landon Deposition, p. 190, JA 69), acknowledges the breadth of the rights retained by Mrs. Landon in her Fox agreement. Unlike the Fox agreement, which contains no mention of the right by Fox to make "television versions," the R and H agreement expressly grants to R and H the right "to make . . . the Play and any dramatic motion picture, radio, television or other versions and adaptations thereof. . . ." (Emphasis added.) Furthermore, the restriction on Mrs. Landon's reserved right under the R and H agreement relating to a television production of her literary work speaks of her "television rights in the original book." There is no reference in

the R and H agreement suggesting any limitation of Mrs. Landon's television rights under the Fox agreement (which is incorporated by reference in the R and H agreement) to productions from living actors.^{25/}

2. The District Court's Improper
Resolution of Several Issues of
Material Fact Concerning Fox's
Intention in 1944

In response to Mrs. Landon's assertions as to Fox's contracting practices, the District Court held the following (Op., pp. 12-13, JA 491-92):

"Landon contends . . . that Fox's contracting practices as reflected in a number of other agreements drafted during the 1940's demonstrate that Fox often and explicitly contracted for the right to produce 'television versions,' and that its failure to do so here is probative of its intent as to the 1944 agreement. The contention is effectively rebutted by the undisputed facts that (1) Fox maintained both East Coast and West Coast legal departments, each with its own drafting style, and (2) Landon's contract was drafted in the office which, as a matter of consistent practice, did not use the magic words 'television versions' to acquire the

^{25/} The language of the R and H agreement negotiated by Miss Strauss for Mrs. Landon certainly belies Miss Strauss' present representation of what rights she understood were conveyed to Fox in 1944. In this respect, see also a letter of December 30, 1957 from Miss Strauss to Mrs. Landon (Exhibit 35 to Mrs. Landon Deposition, JA 112) in which Miss Strauss states that "the R and H contract provides that the television rights in the book are reserved by Mrs. Landon."

rights in issue here, relying instead on general language to achieve the same result. In any event, contracts made between Fox and other copyright owners have little probative value as to what Fox and Landon intended in their particular agreement, see Bartsch v. Metro-Goldwyn-Mayer, supra, 391 F.2d at 154-55."

In this regard, the District Court again erred in numerous respects. First of all, the East Coast-West Coast dichotomy in Fox's legal departments, even if true, has little, if any, legal significance. Fox is clearly responsible for the acts of its agents regardless of their geographic location. At the time of the Landon-Fox contract, Fox was a highly centralized corporation under Darryl Zanuck^{26/} and the only question of any relevance is whether the different language employed by Fox in its agreements effected the conveyance of different rights to the company.

Second, the belated revelations about the two legal departments and their allegedly different drafting styles are set forth in the self-serving counter-affidavits of two present or former members of those departments. As such, they clearly raise serious questions of credibility which can only be resolved on cross-examination. It is

^{26/} See Gussow, DON'T SAY YES UNTIL I'M FINISHED TALKING: A Biography of Darryl F. Zanuck (1971) at p. 140.

wholly inadequate to suggest, as the District Court does, that the assertions are "undisputed" and, therefore, dispositive of this important issue. Indeed, these assertions were adduced to create issues of fact in order to avoid summary judgment for Mrs. Landon.

A fair and just resolution of this question can result only if the interpretation of the contract is arrived at after weighing the credibility of these witnesses. As this Circuit pronounced in Arnstein v. Porter, supra:

"We agree that there are cases in which a trial would be farcical. . . . But where, as here, credibility, including that of the defendant, is crucial, summary judgment becomes improper and a trial indispensable. It will not do, in such a case, to say that, since the plaintiff, in the matter presented by his affidavits, has offered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true. We think that Rule 56 was not designed thus to foreclose plaintiff's privilege of examining defendant at the trial, especially as to matters peculiarly within defendants' knowledge." Id. at 470-71.

The parties' respective positions on this matter "do not eliminate factual issues, but, to the contrary, simply establish factual questions on the material proposition of motive." Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 55 F.R.D. 292, 295 (S.D.N.Y. 1972);

American, Manufacturers Mutual Ins. Co. v. American Broad-
casting - Paramount Pictures, Inc., 388 F.2d 272, 279 (2d
Cir. 1967); Savarin Corporation v. National Bank of Pakistan,
290 F. Supp. 285, 289 (S.D.N.Y. 1968).

Third, while an author ordinarily might be hard
put to dispute the East Coast-West Coast explanation,
assuming arguendo that it has any relevance, the record
of this case does in fact cast great doubt on the valid-
ity of Appellees' contention. Fox gave no inkling of its
position in this connection until after Mrs. Landon had
filed her motion for summary judgment, even though there
were numerous opportunities for Fox to have noted it prior
to that time.

For a substantial period of time Fox resisted Mrs.
Landon's efforts to secure copies of the contracts con-
tained in attachment F, claiming that they were irrele-
vant because they were used by Fox to acquire all televi-
sion rights, without reserving live television rights to
the author. The contracts were first requested on
October 24, 1973, by Mrs. Landon's Second Request for
Production of Documents. (JA 114) On December 28, 1973,
in its Memorandum of Points and Authorities in Opposition

to Plaintiff's Motion to Compel Production of Documents

(at p. 9) Fox stated:

"It is evident from the quotations and discussion in plaintiff's memorandum that the contract clauses quoted by plaintiff are substantially different from the contract clauses here in issue. Thus, the contracts quoted by plaintiff contemplate the complete securing of all television rights by Fox without the reservation of any such rights in the author. Here it is clear that the author did retain some limited television rights in the literary property, and that a different set of contractual provisions were therefore employed." (JA 119)

On May 6, 1974, in a letter (JA 125) to Magistrate Goettel of the District Court below, Fox withdrew its opposition to the motion for production of the 40 agreements and agreed to produce them. Neither in its letter to Magistrate Goettel, nor at the hearing before him on May 1, 1974, nor at any other time prior to July 3, 1974, when it filed its Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment and Reply Memorandum, did Fox make any claim that there were East and West Coast contracts having different "styles" but saying the same thing.

Throughout the entire discovery period, Fox failed to indicate in response to Mrs. Landon's interrogatories as to forms and variations thereof that its West Coast

legal department used a form that differed from that used by its East Coast legal department. In fact, Mrs. Landon's May 25, 1973 Request for Production of Documents (JA 35) sought in paragraph (8), the following:

"All form agreements, including all 'Standard Form' contracts for 'Purchase of Literary Material,' and alternative phrases, clauses and provisions therefor, used by defendant Fox during the period 1940 to 1955, and all internal memoranda, instructions or guidelines relating to the circumstances in which Standard Form Contracts or alternate provisions thereto were to be utilized."

On August 28, 1973, after first having objected on the grounds of irrelevance and burdensomeness (See JA 41), Fox furnished the documents in response to Request No. 8. Among these was a "Form" consisting of four pages which, by Fox's description, was "apparently used in the 1940's." (See JA 43) Another form furnished was described as having been used "sometime in the 1950's." There were alternate versions for the latter form, but not for the form used in the 1940s. No mention was made of any "West Coast" variation of the 1940s form. Nor did that form contain language granting rights beyond those to make "motion picture versions" in grant clause (c). Indeed, as previously noted, clause (c) of the 1940s form was identical to clause (c) of Mrs. Landon's contract.

Moreover, contrary to the District Court's whole-sale acceptance of Appellees' representations, it is not at all clear that all of the contracts in attachment F were drafted by the West Coast legal department. The agreement for MR. BULLFINCH TAKES A WALK (attachment F16, JA 243), drafted in November 1942, prior to the Landon contract, and the contract for THE BRIDGE (attachment F45, JA 355), drafted in July 1951, subsequent to the Landon contract, would seem by their signatories and places of execution to have been drafted by the East Coast legal department. Additionally, at least six of the contracts in attachment F (Nos. 2, 14, 17, 25, 32 and 35, JA 191, 235, 247, 278, 306 and 318), unlike the other purported West Coast contracts, were executed by the author on the East Coast prior to execution by Fox on the West Coast -- so it is not at all clear whether the documents had been drafted by the East Coast or the West Coast legal departments.

Even with respect to the contracts in attachment F which were apparently drafted by the West Coast legal department, there was no discernible difference whatsoever in "drafting style" from that used by the East Coast legal department. The lengthy grant clause (clause (c) or its equivalent) was, in every instance but one, word-for-word

identical in both the so-called East Coast and West Coast agreements, except that in the West Coast contracts the highly significant "television versions" terminology was added to the "motion picture versions" of the standard grant clause. Of the forty-six contracts in attachment F, only No. 41 (JA 341) strays from the regular language of clause (c), which is the same as that contained in Fox's standard form, as well as in the Landon contract.

Thus, it simply makes no sense to say, as the District Court does, that the East Coast legal department relied instead "on general language to achieve the same result." The only "general language" to which the Court could be referring in the grant clauses of the so-called East Coast contracts, including Mrs. Landon's, is the term "motion picture versions." But this very term also appears in the West Coast provision. The only difference between the two grant clauses is that the West Coast provision deliberately adds "television version" to the "motion picture version" of the East Coast provision. The West Coast provision does not say "motion picture versions, including television versions." It says "motion picture and television versions." Accordingly, the term "motion

picture versions" alone cannot be considered "general language" which had broader meaning than the terms "motion picture and television versions" used together.

This is similar to the situation in Davis v. DuPont de Nemours & Company, 240 F. Supp. 612 (S.D.N.Y. 1965) (Feinberg, J.), in which the Court construed the phrase "dramatic rights" in a 1934 agreement as not intended to include motion picture or television rights.

"The December 1934 Agreement does not define dramatic rights. Significantly, however, that agreement in several places refers to 'dramatic rights' and 'motion picture rights' in the same sentence. Therefore, it is reasonable to assume that whatever the phrase 'dramatic rights' meant, it did not include motion picture rights and meant something less than presentations of the story of Ethan Frome in every non-printed medium. Since the parties did not include motion picture rights in the term 'dramatic rights,' I do not believe that they intended to include television rights, if they in fact considered them at all." Id. at 628. (Emphasis added.)

The next question, then, is whether Fox's East Coast legal department broadened the language of television rights clause (f) so as to compensate for the omission of "television versions" in grant clause (c). However, exactly the reverse is the case. In Mrs. Landon's agreement, clause (f) refers only to the right to telecast "any of the motion picture versions of said

literary property produced pursuant hereto." Thus, the television rights in the East Coast agreements, including Mrs. Landon's, are tied inextricably to the limited right to make "motion picture versions" granted in clause (c) of those agreements.

The District Court relied heavily on Goodis v. United Artists Television, Inc., 425 F.2d 397 (2d Cir. 1970), a recent case having a factual pattern and cause of action similar in many respects to those of the present case. In point of law, however, the Goodis case demonstrates the error of granting summary judgment for Appellees in this case. The question in Goodis, as here, turned on whether the author's sale of "the exclusive, complete and entire motion picture rights," subsumed a sale of the right to make films designated initially and specially for television. The defendant film producer was granted summary judgment at the district court level, but on appeal to this Circuit, the decision was overturned on the ground that there were a number of genuine issues that should have been tried.

The contract provisions in Goodis, like clause (f) of the Landon-Fox contract, permitted the defendant to show motion picture versions on television. However, as

for the right to produce a television series, this Court declared that the parties' intent as to the interpretation of the contract could not be adequately dealt with in the absence of a review of the "general customs and expectations of authors and of members of the publishing, broadcasting, and film vocations." Id. at 406.

In the immediate case, the preponderance of West Coast drafts with the additional grant to make "television versions" in clause (c) might be explained in either of two ways. Possibly, contracts for the acquisition of television rights in addition to motion picture rights were channeled primarily through the West Coast legal department. Thus, in the following "television version" contracts, the author executed the agreement in the East, although the Fox executive signed in California: Attachment F2, 14, 17, 25, 32 and 35. (JA 191, 235, 247, 278, 306 and 318) Alternatively, perhaps the West Coast legal department was more perceptive than its East Coast counterpart in realizing that it could not obtain the broad right to make television programs without specifying "television versions" as well as "motion picture versions" in the grant clause. In either case, however, the effect of the different language was to secure lesser rights for Fox by contracts,

such as Mrs. Landon's, failing to specify the right to make "television versions" as one of the rights acquired by Fox. Finally, even if contracts between Fox and other authors have "little probative value as to what Fox and Landon intended in their particular agreement," as suggested by the District Court -- a proposition that, for reasons previously noted, we believe is inconsistent with authoritative precedent^{27/} -- we submit that they nonetheless have sufficient probative value of the existence of a genuine factual controversy to justify a trial on the merits.

CONCLUSION

In sum, the thirteen programs of "Anna and the King" presented in series on television were not "motion picture versions." The producer and telecaster consistently referred to them as a "television series" in trade circles; they were not exhibited in theaters, but were produced

^{27/} The District Court also misapplied Bartsch in commenting that "in any event, contracts made between Fox and other copyright owners have little probative value as to what Fox and Landon intended in their particular agreement." In the unusual situation of the Bartsch case, the Court held that it was really the assignment to Bartsch, not from him to the motion picture company, that must control. Also, it was not clear that the motion picture company's form had been used. Here the assignment and agreement directly involved only Mrs. Landon and Fox, and Fox forms were used.

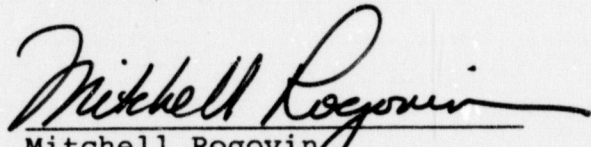
specifically for television presentation; they consisted of thirteen 25-minute programs, the first of which was called a "pilot"; at the option of CBS one or more of the programs could have been produced on videotape or any other medium instead of film; and they were punctuated by artificially added audience laughter throughout. In the light of the "general customs and expectations of authors and of members of the publishing, broadcasting, and film vocations," such a series of programs is not comprised of "motion picture versions." They are most uniquely "television versions." And nowhere in its agreement with Mrs. Landon is there authority for Fox to produce such television versions. By having done so, Fox breached its 1944 agreement with Mrs. Landon and, by telecasting the series with CBS, both infringed Mrs. Landon's copyright. Any assertions to the contrary in Appellees' counter-affidavits at most create issues of fact for trial.

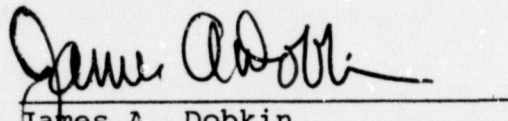
As a simple matter of law it is clear that Fox received less when it took the right to make only "motion picture versions" than it did (all other provisions being equal, as they are) when it acquired the right to make "motion picture and television versions." Precisely what Fox received when it took only the right to make "motion

picture versions" and whether the production of the television series "Anna and the King" fell within the rights it acquired may very well frame issues of fact for trial. But to disregard the facts of record as did the District Court and hold that there is no distinction between the two sets of contracts is patently erroneous.

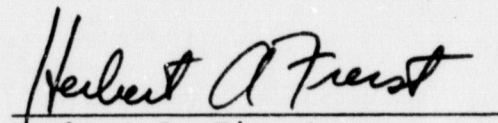
For all the foregoing reasons, we respectfully request that the District Court's grant of summary judgment for the Appellees be reversed and the case remanded to the District Court for a trial on the merits.

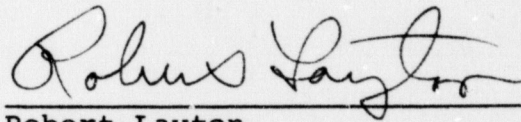
Respectfully submitted,


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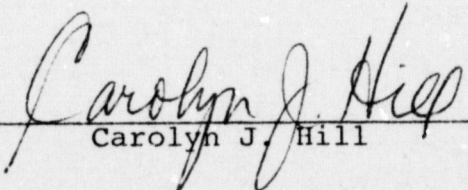
Dated: January 24, 1975

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

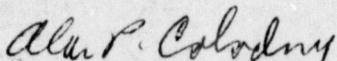
CAROLYN J. HILL, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides in New York, New York. That on the 20th day of January, 1975, deponent served two copies of the within Appellant's Brief and one copy of the within Joint Appendix, Volumes I and II, upon Rogers & Wells, Attorneys for Defendants-Appellees Twentieth Century-Fox Film Corporation and Columbia Broadcasting, Inc., at 200 Park Avenue, New York, New York 10017, the address designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.



Carolyn J. Hill

Sworn to before me, this
20th day of January, 1975



Notary Public

ALAN P. COLODNY
Notary Public, State of New York
No. 60-5767987
Qualified in Westchester County
Certificate Filed in New York County
Term Expires March 30, 1976

